No. 83-1198

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In the Supreme Court of the United States

OCTOBER TERM, 1983

STONE BOAT YARD, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board reasonably found that petitioner violated Section 8(a)(5) and (1) of the Act by unilaterally changing fringe benefits after the expiration of the collective bargaining agreement without first informing the bargaining agent of the specific changes it intended to make.

2. Whether the Board properly found that the unfair labor practice charge was not time-barred.

3. Whether the Board's remedial order was reasonable and proper.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 715 F.2d 441. The decision and order of the National Labor Relations Board (Pet. App. 9a-34a) is reported at 264 N.L.R.B. No. 130.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1983. The petition for a writ of certiorari was filed on December 2, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act (the Act), 29 U.S.C. (& Supp. V) 151 *et seq.*, are set forth at Pet. App. 35a-39a.

STATEMENT

1. The collective bargaining agreement between Stone Boat Yard (the Company), an independent boat building and repair yard, and Local 1149 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, was traditionally based on a master agreement negotiated between a multi-employer trade association, the Pacific Coast Ship Builders Association, and the Pacific Coast Marine Carpenters' Council. The most recent master contract was effective from July 1, 1977 to June 30, 1980. Pet. App. 9a-10a, 27a. In July 1977, the Company and Local 1149 agreed, with some modifications, to be bound by that agreement (*id.* at 10a, 27a).

On April 15, 1980,[1] two and one-half months before the 1977-1980 master agreement was to expire, the Carpenters' Council secretary, Gerald Krahn, sent to all signatory employers notification that the master agreement would terminate on June 30 and requested to "hear from [them at their] earliest convenience on making arrangements to begin negotiations for a new Agreement" (Pet. App. 10a, 27a). Five weeks later, on May 21, Company President Richard Folker replied with a one-sentence letter to Local 1149's financial secretary and business agent, Ted Knudson: "This notifies you * * * that it is the intent of [the Company] to offer substantial changes in the entire contract effective 1 July 1980" (*id.* at 28a). Folker gave no indication of the particular contract changes he had in mind. Knudson received the letter a day or so before May 29, when negotiations for a new master agreement were scheduled to begin in Portland, Oregon. When Knudson arrived in Portland, Carpenters' Council Secretary Krahn said discussions with the independent employers would not begin until the master negotiations were completed. *Id.* at 10a, 28a, 30a.

Knudson was preoccupied in Portland representing Local 1149 in the master contract negotiations until late June, when the parties agreed on a tentative contract. In

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[1] Unless otherwise noted, all dates herein are in 1980.

early June, while Knudson was bargaining in Portland, Company President Folker called Knudson's office in Oakland several times to arrange for bargaining negotiations, but was told by Local 1149's receptionist that union officials were tied up in negotiations for a new master contract. Pet. App. 10a, 28a.

In late June, while Knudson was still preoccupied in Portland, Folker called an employee meeting in which he announced that, as of July 1, the Company would unilaterally institute a medical and dental group insurance plan at no cost to the employees. As of July 1, the Company instituted its own health plan and discontinued payments to Local 1149's health and welfare plan and pension plan. Pet. App. 10a, 30a-31a. The Company did not give Local 1149 any advance notice of these changes and did not inform the Local that it would implement such changes unilaterally (*id.* at 12a).

Meanwhile, the Carpenters' Council and the Ship Builders Association tentatively reached agreement on a new master contract, but, on or about June 30, the union members refused to ratify the agreement. Subsequently, the Ship Builders Association improved its contract offer, and, on July 22, Knudson wrote to the Company describing the improvements and stating that, when the contract is ratified, it would be presented to the Company for signature. Pet. App. 10a, 29a-31a. Two days later, on July 24, Folker told Knudson that he would not sign the master agreement. In late July or early August, Knudson learned for the first time that the Company had ceased making contributions to the health and welfare and pension plans. *Id.* at 13a n.5, 29a.

On August 21, Knudson sent notice to the Company that the membership had ratified the master agreement; Knudson described the benefits, stated that these benefits were payable retroactively to July 1, and said the contract would

be made available for execution as soon as it was received from the printer (Pet. App. 10a, 28a-29a). Subsequently, representatives of the Company and Local 1149 met, but the Company refused to sign the master contract (*id.* at 10a, 31a).

2. The Board (then-Chairman Van de Water dissenting) found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by unilaterally discontinuing payments to the health and welfare and pension plans and by unilaterally implementing a medical group insurance plan (Pet. App. 9a-34a). The Board noted that, where an employer has made a specific proposal to change terms of employment after the expiration of a contract about which the union has "avoided or delayed bargaining," the employer may unilaterally implement its proposed change (*id.* at 11a-13a & n.3). The Board found that that principle had no application here, however, because the Company "never provided the Union any type of written or detailed proposal of changes in the expired contract * * * and * * * did not implement changes which were consistent with any previously rejected offer" (*id.* at 12a).

The Board rejected the Company's argument that Local 1149's unfair labor practice charge was time-barred by the six-month limitations period in Section 10(b) of the Act, 29 U.S.C. 160(b). The Board noted that, although the changes in fringe benefits were implemented on July 1, Local 1149's business agent, Ted Knudson, learned of these changes for the first time in late July or early August. Moreover, Company President Folker testified that the Company informed the Union of the changes sometime in August. Because the unfair labor practice charge was filed on January 5, 1981, within six months after the Union learned of the unilateral action, the Board held that it was not time barred. Pet. App. 13a n.5.

The Board ordered the Company, inter alia, to pay to the health and welfare and pension plans the contributions the Company had failed to make as a result of its unilateral actions, and to make the employees whole for losses or expenses they may have suffered as a result of the Company's unilateral actions (Pet. App. 15a-17a).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 1a-8a). The court concluded that "[t]he Board's requirement, that an employer give detailed notice of proposed changes before unilaterally implementing them, is a reasonable interpretation of the Act" (*id.* at 5a). The court explained (*id.* at 6a):

> Disclosure of proposed changes will facilitate open discussions by requiring employers to specify proposed changes in conditions of employment before implementing them unilaterally. Such disclosure will give the unions notice of exactly what might be lost if they waive the opportunity to bargain by continual and unwarranted delay.

The court of appeals further agreed with the Board that the six-month limitations period of Section 10(b) of the Act, 29 U.S.C. 160(b), "does not begin to run until the party filing the charge knows or has reason to know that an unfair labor practice has occurred" (Pet. App. 6a), and it rejected the Company's argument that the Union had notice of the unfair labor practice more than six months before the date on which the change was filed (*id.* at 6a-7a). Finally, the court rejected the Company's argument that the portions of the Board's order that require it to make employees whole and to pay past due contributions to the Union's health and welfare and pension funds were punitive because they did not take into account benefits employees received through the alternative medical group insurance plan unilaterally provided by the Company (*id.* at 7a-8a).

ARGUMENT

1. Petitioner concedes (Pet. 4-5) that the expiration of the collective agreement did not entitle it to unilaterally change the existing terms of employment.[2] Petitioner contends (Pet. 5-6), however, that, despite never having notified the Union concerning the fringe benefit changes it intended to make, it was entitled to make those changes because the Union did not respond to its attempts to begin negotiations. This contention is without merit.

The Board has held that, where an employer has diligently sought to bargain and the union has avoided or delayed bargaining, the employer may unilaterally change employment terms but only if such changes are "consistent with the employer's previous proposal to the union of changes in the expired contract" (Pet. App. 12a (emphasis omitted). The court of appeals correctly concluded (*id.* at 5a) that "[t]he Board's requirement, that an employer give detailed notice of proposed changes before unilaterally implementing them, is a reasonable interpretation of the Act." As the Board explained (*id.* at 12a-13a n.3), such disclosure serves the "important functions of informing the union what changes in the contract are sought by the employer and putting the union on notice that after a reasonable period of time union inaction might result in the

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[2]Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), which makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees," precludes an employer from unilaterally changing wages, hours and other terms and conditions of employment. *NLRB* v. *Katz*, 369 U.S. 736, 742-747 (1962); *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 209-210 (1964). A collective agreement "survives its expiration date for purposes of marking the status quo as to wages and working conditions. The employer is required to maintain that status quo following the expiration of the collective bargaining agreement until the parties negotiate a new agreement or bargain in good faith to impasse." *NLRB* v. *Carilli*, 648 F.2d 1206, 1214 (9th Cir. 1981). Accord, *NLRB* v. *Cauthorne*, 691 F.2d 1023, 1025 (D.C. Cir. 1982); *Industrial Union of Marine & Shipbuilding Workers* v. *NLRB*, 320 F.2d 615, 620 (3d Cir. 1963), cert. denied, 375 U.S. 984 (1964).

employer's unilateral implementation of these proposed changes." Further, as the court below recognized (*id.* at 5a), requiring disclosure of proposed changes is in harmony with standards governing unilateral changes following bargaining impasse. Thus, it is well settled that such changes must be reasonably comprehended in the terms of the employer's previous contract offers to the union and "[t]he Union must be given a chance to discuss the specifics of any proposal before it is implemented * * *." *Peerless Roofing Co.* v. *NLRB*, 641 F.2d 734, 735 (9th Cir. 1981). Accord, *Winn-Dixie Stores, Inc.* v. *NLRB*, 567 F.2d 1343, 1350 (5th Cir.), cert. denied, 439 U.S. 985 (1978).

Petitioner complains (Pet. 6) that the Board's rule requires it "to remain in the union fringe benefit plans after the contractual obligation to do so has expired and until such time as the Union has decided to be available to this individual company for negotiations." The Board's rule commands no such result. All the Company had to do was to mail the Union a copy of its proposed change with a notice that it intended to implement that proposal; if, after having received such notice, the Union had continued to refuse to bargain, the Company could have implemented the change. See *AAA Motor Lines, Inc.*, 215 N.L.R.B. 793, 794 (1974). Here, however, the Company did not notify the Union of the content of its proposed changes, but merely sent it a letter in May stating that it intended "to offer substantial changes in the entire contract effective 1 July 1980" (Pet. App. 10a, 28a).

2. Petitioner contends (Pet. 7-8) that the settled rule that the six-month limitations period contained in Section 10(b) of the Act, 29 U.S.C. 160(b), does not begin to run until the

charging party learns of the unlawful activity[3] should not be applied here because it was the Union's own refusal to bargain that kept it ignorant of the Company's action. As pointed out above, however, the Union cannot be faulted for waiting until the Company notified it of the specific changes the Company intended to make. Moreover, it should be noted that the Union's refusal to negotiate was in accordance with the parties' custom of negotiating the master agreement before engaging in individual negotiations with the independents. Contrary to petitioner's suggestion (Pet. 6, 8), there is no finding here that the Union was derelict with respect to its statutory obligation to represent the Company's employees.

3. Where an employer has committed an unfair labor practice by discontinuing payments to a union's trust funds, the Board may require the employer to restore the status quo ante by making employees whole for losses or expenses, by repaying all monies that have been unlawfully withheld from the union's trust funds, and by continuing to make such payments until the parties negotiate in good faith to a new contract or to impasse. See *NLRB* v. *Carilli*, 648 F.2d 1206, 1217 (9th Cir. 1981); *Peerless Roofing Co.* v. *NLRB*, 641 F.2d at 736; *Hinson* v. *NLRB*, 428 F.2d 133, 136-138 (8th Cir. 1970).

There is no merit to petitioner's contention (Pet. 6-7) that the Board's remedial order is "punitive" insofar as it requires retroactive payments to the Union's benefit funds, without a showing of employee loss and with no offset for the Company-sponsored medical insurance plan. As the court below properly concluded (Pet. App. 8a (citation omitted)):

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[3] *Peerless Roofing Co.* v. *NLRB*, 641 F.2d at 736; *NLRB* v. *Allied Products Corp.*, 548 F.2d 644, 650 (6th Cir. 1977).

> [A]n employer cannot complain of the extra cost of improperly created, substitute fringe benefits. The company is merely required to repay what it has unlawfully withheld. * * * Even if [petitioner's] substitute fringe benefit program met the present needs of its employees, the diversion of contributions from the union funds undercut the ability of those funds to provide for future needs.

Carpenter Sprinkler Corp. v. *NLRB*, 605 F.2d 60 (2d Cir. 1979), cited by petitioner (Pet. 7), is factually distinguishable from this case. There, in refusing to enforce the Board's order for retroactive payments to the union's welfare, health, and pension funds, the Second Circuit stated (605 F.2d at 69):

> [W]e do not hold that the Board can never order remedial action of the type here. In appropriate cases, restitution orders and requirements of return to the *status quo ante* can be effective ways of implementing the policies of the Act. In the circumstances of this case, however, where a small employer in an economically depresssed region with twenty years of good relations with the union makes unilateral changes after some indication that an impasse in bargaining had occurred, extensive and financially crippling remedial action * * * should not be enforced.

No such circumstances exist here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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